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Appellate Case No. 243737

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ED L. CHRISTENSEN, Appellant,

v.

RICHARD A. ELLSWORTH, Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF STATUTES CITED

TABLE OF RULES CITED

ASSIGNMENT OF ERROR

1. The Superior Court erroneously ruled that the three-day notice provision for unlawful detainer under RCW 59.12.030(3) should be calculated in accordance with CR 6.

2. Based on the Court's application of CR 6 to the calculation of notice pursuant to RCW 59.12.030(3), the Superior Court erroneously dismissed Appellant's unlawful detainer action for lack of jurisdiction.

STANDARD ON REVIEW

This appeal involves a question of statutory interpretation, which, the Washington Supreme Court has held to be a question of law. Accordingly, this Court's standard of review is de novo. Department of Labor and Industries of the State of Washington v. Gongyin, 154 Wash.2d 38, 109 P.3d 816 (2005)("The meaning of a statute is inherently a question of law and our review is de novo."), citing King County v. Central Puget Sound Growth Management Hearings Board, 142 Wash.2d 543, 555, 14 P.3d 133 (2000); Dioxin/Organochloride Center v. Pollution Control Hearings Board, 131 Wash.2d 345, 352, 932 P.2d 158 (1997).

STATEMENT OF THE CASE

On Friday, July 3, 1998, Mr. Christensen served, by certified mail and by regular mail and by posting, a "Notice to Pay Rent or Vacate" on

Defendant, Richard Ellsworth ("Mr. Ellsworth"). CP at 3. In accordance with RCW 59.12.030(3) and RCW 59.12.040, Notice was served four days before service of Summons and Complaint for Unlawful Detainer on July 8, 1998. Id.

On Friday, July 3, 1998, Mr. Christensen also served, by certified mail and by regular mail and by posting, a "Notice to Comply with Lease or Quit Premises" on Mr. Ellsworth. CP at 3. This Notice was served in accordance with RCW 59.12.030(4).

On Tuesday, July 7, 1998, Mr. Christensen served, by certified mail and by regular mail and by posting, a "Notice to Quit for Waste and Nuisance Use of the Premises" on Mr. Ellsworth. CP at 3.

On Wednesday, July 8, 1998, Mr. Christensen served, by personal service, a "Summons" and "Unlawful Detainer & Order to Show Cause" on Mr. Ellsworth. CP at 1-5.

Mr. Ellsworth failed to make an appearance or answer or defend Mr. Christensen's unlawful detainer action and on Friday, July 17, 1998, this Court entered a Writ of Restitution and Order for Default. CP at 15-16, 14.

On Saturday, July 18, 1998, Whitman County Sheriff served the Court's Writ of Restitution and Notice to Vacate before midnight, Wednesday, July 22, 1998.

On Thursday, July 23, 1998, Mr. Ellsworth was forcibly evicted from his apartment in the presence of Whitman County Sheriff's officers who held him at bay.

On December 29, 2004, Mr. Christensen filed a Motion for Default Judgment. CP at 17-18. Mr. Ellsworth filed his Answer / Defenses / Counterclaim on April 19, 2005. CP 19-21. On April 27, 2005, Mr. Ellsworth filed a Motion to Set Aside Order of Default which was entered on July 17, 1998. CP at 27-30. On April 22, 2005, Mr. Christensen filed a Motion for an Order to Strike Defendant's Answer and Counterclaims. CP at 22-26. Mr. Christensen filed a Response to Motion to Set Aside Order of Default on May 14, 2005. CP at 31-34. Hearing on these matter was held on May 24, 2005 and on June 8, 2005, the Superior Court issued its Order granting Mr. Christensen's Motion for an Order to Strike Defendant's Answer and Counterclaims and denying Mr. Ellsworth's Motion to Set Aside Order of Default. CP at 35-36. The Court also allowed Mr. Ellsworth an opportunity to challenge Mr. Christensen's Default Order.

On June 10, 2005, Mr. Ellsworth filed a Motion to Vacate Void Judgment. CP at 37-39 On June 13, 2005 Mr. Christensen filed a Response to Defendant's Motion and Memorandum to Vacate Void Judgment. CP at 44-48. These matters were heard on June 15, 2005 and

on June 22, 2005 the Superior Court issued its Order of Dismissal. CP at 60-61.

ARGUMENT

1. THE SUPERIOR COURT ERRONEOUSLY RULED THAT THE THREE-DAY NOTICE PROVISION IN RCW 59.12.030 SHOULD BE CALCULATED IN ACCORDANCE WITH CR 6.

The three day notice provision in RCW 59.12.030(3) does not reference, explicitly or implicitly, CR 6 as the basis for calculating statutory notice. "In construing a statute, the court's objective is to determine the legislature's intent." Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Id. at 9-10, quoting State v. J.M., 144 Wash.2d 472, 480, 28 P.3d 720 (2001). "To discern legislative intent, 'the court begins with the statute's plain language and ordinary meaning,' but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole." The Quadrant Corp. v. State of Washington Growth Management Hearings Board, 154 Wash.2d 224, 239, 110 P.3d 1132 (2005), citing Central Puget Sound Growth, 142 Wash.2d at 555, 560; Washington Public Ports Association v. Department of Revenue, 148 Wash.2d 637, 645, 62 P.3d 462 (2003)("The 'plain

meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."). Courts may not ignore, omit, or alter terms in a statute. Arborwood Idaho L.L.C. v. City of Kennewick, 151 Wash.2d 359, 367, 89 P.3d 217 (2004).

2. THE SUPERIOR COURT'S APPLICATION OF CR 6 TO THE NOTICE PROVISION IN RCW 59.12.030(3) IS CONTRARY TO THE PLAIN TERMS OF THE STATUTE.

Among the several bases for an unlawful detainer action, Section 59.12.030(3) defines unlawful detainer upon a tenant's failure to pay rent:

> When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due.

RCW 59.12.030(3).

According to its plain terms, Section 59.12.030(3) requires that, before taking legal action against a tenant, a landlord must serve notice on the tenant that the tenant is in default for failure to pay rent, and must pay rent or vacate the premises within three days. The statute does not

specifically define the term "days;" whether "days" means calendar days or business days excluding weekends and holidays.

Principles of statutory interpretation are premised on the assumption that the legislature intended Section 59.12.030(3) as written. Diehl v. Western Washington Growth Management Hearings Board, 153 Wash.2d 207, 214, 103 P.3d 193 (2004)("When statutory language is clear and unequivocal, courts must assume that the legislature meant exactly what it said and apply the statute as written."), citing Ricketts v. Washington State Board of Accountancy, 111 Wash.App. 113, 116, 43 P.3d 548 (2002). Thus, when the Court reads Section 59.12.030(3) it may not assume that the legislature unintentionally omitted the definition of "days" leaving the definition of this term for the Court's interpretation. Rather, principles of statutory interpretation compel the conclusion that the legislature intentionally omitted the definition of "day" and intended that the term should be read in accordance with its ordinary meaning. Burton v. Lehman, 153 Wash.2d 416, 422-23, 103 P.3d 1230 (2005)("A statutory term that is left undefined should be given its "usual and ordinary meaning and courts may not read into a statute a meaning that is not there."), citing State v. Hahn, 83 Wash.App. 825, 832, 924 P.2d 392 (1996). Common meaning may be derived from a term's dictionary definition. Id. at 423 ("If the undefined statutory term is not technical, the

court may refer to the dictionary to establish the meaning of the word."), citing Heinsma v. City of Vancouver, 144 Wash.2d 556, 564, 29 P.3d 709 (2001); see also Dahl-Smyth, Inc. v. City of Walla Walla, 148 Wash.2d 835, 842-43, 64 P.3d 15 (2003)(common meaning may be determined by referring to a dictionary).

Webster's Third New International Dictionary of the English Language defines "day," as "civil day," which in turn is defined as "calendar day." See Webster's Third New International Dictionary of the English Language 578, 316 (2002); Troxell v. The Rainier Public School District, No. 307, 154 Wash.2d 345, 357, 111 P.3d 1173 (2005)(referring to Webster's Third New International Dictionary of the English Language for the definition of "day," as "calendar day.").

Thus, without a specific definition for the term "day" and without specific instructions as to how "three days" must be calculated, principles of statutory interpretation require the Court to define the term "day" as calendar day which includes weekend days and holidays.

Contrary to the plain meaning of Section 59.12.030(3), the Superior Court determined that the meaning of "days" should be read in accordance with CR 6. CR 6(a) states in pertinent part:

> In computing any period of time . . . the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall

> be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. . . . When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

CR 6(a).

Thus, applying CR 6(a), the Superior Court ruled that, since the notice provision in Section 59.12.030(3) is less than seven days, intermediate Saturdays, Sundays, and legal holidays should not be included in the calculation. The Superior Court reasoned that application of CR 6(a) is appropriate because if "three days" is defined as three calendar days, a tenant served with notice on a Friday could be found to be in default on the following Monday. If a longer weekend-holiday followed service of notice, a tenant could be in default during the holiday. And, if the tenant is away from home for an extended weekend or holiday, the tenant may not receive notice at all before default is declared.

Mr. Christensen served notice pursuant to Section 59.12.030(3) on Friday, July 3, 1998. Having received no response from Mr. Ellsworth, Mr. Christensen served on Mr. Ellsworth a Summons and Complaint for Unlawful Detainer on July 8, 1998. The span of time between service of notice and service of summons and complaint, five days, was not in compliance with CR 6, the Superior Court ruled. According to CR 6,

excluding Saturday, July 4 and Sunday, July 5, Mr. Christensen should have served the summons and complaint on or after Thursday, July 9, 1998.

3. THE SUPERIOR COURT'S APPLICATION OF CR 6 TO THE NOTICE PROVISION IN RCW 59.12.030(3) IS CONTRARY TO THE LEGISLATIVE AND THE HISTORICAL PURPOSE OF THE UNLAWFUL DETAINER STATUTE.

The calculation of time under CR 6 should not apply if Section 59.12.030(3) is understood in the context of the entire statute, taking into account the legislative purpose in enacting the statute and the history of the purpose of the statute.

"An unlawful detainer action is a summary proceeding to determine the right to possession of property." Josephinium Associates v. Kahli, 111 Wash.App 617, 624, 45 P.3d 627 (2002), citing Heaverlo v. Keico Industries, Inc., 80 Wash.App. 724, 728, 911 P.2d 406 (1996). "Its history is grounded in the preservation of peaceful and lawful remedies for the landlord, to avoid forcible evictions." Id., citing Young v. Riley, 59 Wash.2d 50, 52, 365 P.2d 769 (1961). "The action is narrow, and the court's jurisdiction is limited to settling the right of possession." Id., citing Munden v. Hazelrigg, 105 Wash.2d 39, 45, 711 P.2d 295 (1985). The Washington Supreme Court explained in MacRae v. Way, 64 Wash.2d 544, 392 P.2d 827 (1964):

> Unlawful detainer actions are statutorily created summary proceedings, primarily designed for the purpose of hastening recovery of possession of real property. The principal subject matter of the action is the possession of the subject property.

Id. at 546-47.

"By reason of provisions designed to hasten the recovery of possession, the statutes creating it remove the necessity to which the landlord was subjected at common law, [*sic*] of bringing an action of ejectment [under RCW 7.28] with its attendant delays and expenses." Housing Authority of the City of Everett v. Terry, 114 Wash.2d 558, 563, 789 P.2d 745 (1990), citing Wilson v. Daniels, 31 Wash.2d 633, 643-44, 198 P.2d 496 (1948). "However, in order to take advantage of its favorable provisions, a landlord must comply with the requirements of the statute. Id. at 563-64, citing Sowers v. Lewis, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957).

Among its requirements, the unlawful detainer statute mandates that, before invoking the court's jurisdiction to compel the tenant to vacate the property so that the landlord may retake possession, a landlord must serve upon the tenant, who is in default in payment of rent, notice to pay rent or vacate the premises. Housing Resource Group v. Price, 92 Wash.App. 394, 958 P.2d 327, 331 (1998), citing RCW 59.12.030(3). Following service of notice to pay rent or vacate the premises, the tenant

has three days to cure the default or vacate, before an action for unlawful detainer may be brought.

Given the purpose of the unlawful detainer statute, as a summary proceeding to hasten the recovery of possession of real property, the "three day" notice provision under Section 59.12.030(3) is very short. The "three day" notice is preliminary to the filing of an action for unlawful detainer, allowing the tenant an opportunity to cure the default and if the default is not rectified, allowing the landlord to quickly repossess and re-rent the property to mitigate damages resulting from the tenant's default.

By excluding weekend days and holidays from the calculation of the three day notice under Section 59.12.030(3), the Superior Court converted the summary proceeding, as intended by the legislature, into a potentially much lengthier process that may go on for five or six days or more. By excluding weekend days and holidays from the calculation of three days under Section 59.12.030(3), the Court contravened the legislative purpose of removing the necessity of bringing a common law action of ejectment under RCW 7.28 with its attendant delays and expenses.

4. THE SUPERIOR COURT'S APPLICATION OF CANTERWOOD PLACE V. THANDE WAS ERROR.

To support its position, the Superior Court cited Canterwood Place v. Thande, 106 Wash.App. 844, 25 P.3d 495 (2001). Canterwood addressed, as a matter of first impression, whether CR 6 applies to the calculation of time for the return date on an unlawful detainer summons issued under RCW 59.12.070. Id. at 846.

The Superior Court applied CR 6 to the calculation of the notice provision under RCW 59.12.030(3) based on the fact that "Chapter 59 [the unlawful detainer statute] does not contain a complete rule regarding the calculation of days. . . . There is no method of computing time, nor is there a provision regarding whether 'days' referred to in the statute are business days, court days, or calendar days. Instead, the unlawful detainer statute defers to the civil rules to provide the rules of practice." Canterwood, 106 Wash.App. at 848, citing RCW 59.12.180 ("Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter[.]"). Thus, generalizing from the Canterwood application of CR 6 to Section 59.12.070, the Superior Court applied CR 6 to Section 59.12.030(3).

However, Canterwood is inapposite as precedent supporting the Superior Court's ruling. The Canterwood Court did not address the three-day notice provision in RCW 59.12.030(3). Rather, Canterwood addressed the computation of time for service of summons in an unlawful detainer action.

The Canterwood Court correctly applied CR 6 to the calculation of time for service of summons. A summons initiates an action in Superior Court and thus the Superior Court Civil Rules govern. Canterwood, 106 Wash.App. at 497, citing CR 1 ("These rules govern the procedure in the superior court in all suits of a civil nature. . . ."); see also CR 3 ("Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint.").

The Canterwood Court correctly concluded that, under RCW 59.12.070, an unlawful detainer action, initiated before the Superior Court, is a civil action governed by the Superior Court Civil Rules. However, the notice provision under RCW 59.12.030(3) does not initiate an action before the Superior Court. The Superior Court Civil Rules are not invoked until a matter is brought before the Superior Court. See Housing Authority of the City of Everett v. Terry, supra, 114 Wash.2d at 564-65 (proper notice under RCW 59.12.030 is a "jurisdictional condition

precedent" for an action in Superior Court). RCW 59.12.030(3) is a preliminary provision notifying the tenant that the tenant is in default, allowing the tenant to cure the default or to vacate the premises before an action is initiated in Superior Court. According to the Civil Rules, an action before the Superior Court is initiated by service of a summons. See CR 3. Before a summons is served no action exists before the court and so the Civil Rules do not apply. See MacRae, supra, 64 Wash.2d at 547 ("Such jurisdiction as the superior court obtains arises out of service of the statutory summons. It does not arise from service of the statutory notices, *e.g.,* notice to quit, notice to pay rent or vacate."), citing State ex rel. Robertson v. Superior Court, 95 Wash. 447, 164 P. 63 (1917).

Thus, contrary to the Canterwood Court's conclusion that CR 6 applies to RCW 59.12.070, which specifies the requirements of a summons initiating an unlawful detainer action before the Superior Court, CR 6 does not apply to RCW 59.12.030(3) which is preliminary to an action for unlawful detainer before the Superior Court. Accordingly, the Superior Court's reliance on Canterwood was error.

CONCLUSION

The Superior Court's application of CR 6(a) to the calculation of the three day notice requirement of RCW 59.12.030(3) is contrary to long-established principles and procedures of statutory interpretation. Section

59.12.030(3) is clear and unambiguous as written, and the concise terms of the statute do not expressly or impliedly reference CR6. Because the notice provision of Section 59.12.030(3) is preliminary to the initiation of a law suit in Superior Court, the Superior Court Civil Rules and CR 6 do not apply.

Mr. Christensen complied with the statutory requirements of the three-day notice provision of RCW 59.12.030(3) when he served notice on Mr. Ellsworth on July 3, 1998. Because the notice was made by posting and by mail, Mr. Ellsworth actually received a four day notice. See RCW 59.12.040. On July 8, 1998, Mr. Christensen served by personal service a "Summons" and "Unlawful Detainer & Order to Show Cause." Thus, prior to commencement of civil action in Superior Court, Mr. Ellsworth received a four-day notice, as required under RCW 59.12.030(3) and RCW 59.12.040. Accordingly, the Superior Court's dismissal of Mr. Christensen's unlawful detainer action, for lack of jurisdiction for failure to comply with RCW 59.12.030(3), was error and Mr. Christensen respectfully requests that this Court reverse the Superior Court's ruling and remand the matter for further proceedings.

DATED this 10th day of October, 2005

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